

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

Case No. CIV-08-0916 WJ/LAM

Case No. CR-04-0236 WJ

JAIME MENDOZA,

Defendant/Movant.

**ORDER ADOPTING MAGISTRATE JUDGE'S
PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

THIS MATTER is before the Court on the Magistrate Judge's Proposed Findings and Recommended Disposition (*CV Doc. 17; CR Doc. 104*) (hereinafter, "PF&RD"), filed on March 20, 2009.¹ On April 3, 2009, Defendant/Movant Jaime Mendoza filed timely objections to the PF&RD in his Petitioner's Objections to the Magistrate's Proposed Findings and Recommended Disposition (*CV Doc. 18; CR Doc. 106*) (hereinafter, "Mendoza's Objections"). Plaintiff/Respondent United States of America (hereinafter, "United States") did not file objections to the PF&RD, but did file a timely response to Mendoza's Objections. *See* United States Response' to Defendant's Objections (*CV Doc. 20; CR Doc. 107*).

The Court has conducted a *de novo* review of those portions of the PF&RD to which Mr. Mendoza objects and finds that the objections are without merit. Accordingly, the Court has determined that it will overrule Mr. Mendoza's objections; adopt the PF&RD; deny Mr. Mendoza's

¹All document numbers referenced in this Order with the designation "CV" are from Case No. CIV-08-0916 WJ/LAM. All document numbers referenced in this Order with the designation "CR" are from Case No. CR-04-0236 WJ.

Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (*CV Doc. 3; CR Doc. 96*) (hereinafter, “2255 Motion”), without an evidentiary hearing; and enter a judgment dismissing this case with prejudice.

Objections to the PF&RD

Mr. Mendoza objects to the Magistrate Judge’s conclusion that Mr. Mendoza’s procedural default arguments are without merit. Having reviewed the PF&RD, the parties’ submissions and relevant parts of the record in Mr. Mendoza’s criminal case, the Court finds no basis for his arguments that cause and prejudice exist for overcoming procedural default based on a change in the law after his appeal was final or ineffective assistance of trial counsel.

Mr. Mendoza also objects, more specifically, to the Magistrate Judge’s conclusion that the United States Supreme Court’s decisions in *Gall v. United States*, ___ U.S. ___, 128 S.Ct. 586 (2007) and *Kimbrough v. United States*, ___ U.S. ___, 128 S.Ct. 558 (2007), are not retroactive to cases on collateral review. Mr. Mendoza cites no case holding that these decisions are retroactive on collateral review. Although the Court has not found any reported cases on the subject in this district or the Tenth Circuit Court of Appeals, other courts deciding the question of whether *Gall* and *Kimbrough* are retroactive on collateral review have reached the conclusion that they are not, demonstrated by the cases cited in the PF&RD and the United States’ response to the objections. See PF&RD (*CV Doc. 17; CR Doc. 104*) at 9-10; United States’ Response to Defendant’s Objections (*CV Doc. 20; CR Doc. 107*) at 3, n. 1. Moreover, *Gall* and *Kimbrough* are further explanations of the rule announced in *United States v. Booker*, 543 U.S. 220, 245 (2005), that the United States Sentencing Guidelines are advisory, and the Tenth Circuit has held that *Booker* does not apply retroactively to cases on collateral review. See *United States v. Bellamy*, 411 F.3d 1182, 1186-87

(10th Cir. 2005). Thus, it follows that *Gall* and *Kimbrough* do not apply retroactively on collateral review.

Conclusion

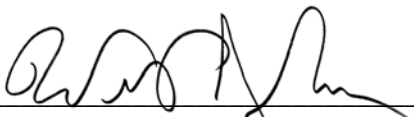
The Court concludes that Mr. Mendoza's objections to the PF&RD have no merit and should be overruled.

IT IS THEREFORE ORDERED that Petitioner's Objections to the Magistrate's Proposed Findings and Recommended Disposition (*CV Doc. 18*; *CR Doc. 106*) are **OVERRULED**, and the Magistrate Judge's Proposed Findings and Recommended Disposition (*CV Doc. 17*; *CR Doc. 104*) are **ADOPTED** by the Court.

IT IS FURTHER ORDERED that Mr. Mendoza's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (*CV Doc. 3*; *CR Doc. 96*) is **DENIED**, without an evidentiary hearing.

IT IS FURTHER ORDERED that this case be **DISMISSED WITH PREJUDICE** and that a final judgment be entered concurrently with this Order.

IT IS SO ORDERED.



HONORABLE WILLIAM P. JOHNSON
UNITED STATES DISTRICT JUDGE